# In the United States

# Circuit Court of Appeals

## For the Ninth Circuit

Santa Cruz Development Company, a Corporation,

Appellant,

—vs.—

Cornelius C. Watts, et al.,

Appellee.

No. 2719.

**REPLY BRIEF OF JOSEPH E. WISE TO THE BRIEF OF SANTA CRUZ DEVELOPMENT COMPANY AS TO THE DEED FROM JOHN WATTS, ET AL., TO DAVID W. BOULDIN, OF SEPTEMBER 30, 1884, WISE EXHIBIT 16.**

SELIM M. FRANKLIN,
Attorney for Joseph E. Wise.

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### STATEMENT.

Counsel for Joseph E. Wise, on the 2nd day of February, 1916, received the brief and supplemental brief for Santa Cruz Development Commpany, appellants, and desires to make reply to that portion of said briefs which attempts to show that the deed executed by the heirs of John S. Watts to David W. Bouldin, on Septem-

ber 30, 1884, was an executory contract, and not a deed. This subject is treated on pp. 78 to 113 of the brief of G. H. Brevillier, Esq., and pp. 45 to 49 of the brief of James W. Vroom, Esq., counsel for Santa Cruz Development Company.

Joseph E. Wise, in the brief heretofore filed upon his own appeal, has considered this deed on pp. 151 to 190 thereof, reference to which pages in his brief is hereby made. But as the Santa Cruz Development Company has raised some new questions and points, it is necessary briefly to reply thereto.

**Deed not void as a conveyance.**

Counsel assert that the deed is void as a conveyance, because not acknowledged. However, it is proved by a subscribing witness, Tr. p. 280, which under the Arizona statute in force at the time, was as valid as an acknewledgment. The law then in force is Compiled Laws of 1877, which we will quote:

> "Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved and certified, in the man-
>
> ner hereinafter provided."
>
> Sec. 2247 Comp. Laws of Arizona, 1877.
>
> "The proof of the execution of any conveyance whereby real estate is conveyed or may be affected

shall be: first by the testimony of a subscribing witness; * * *"

Sec. 2254 Id.

The form of the certificate of the officer is set forth in Sec. 2257 thereof.

This point is considered in our main brief on pages 170 to 180, in which we show that the deed was proved by a subscribing witness in 1888, under the Revised Statutes of 1887, in force at that time. The deed was proved in compliance with both the old law of 1877 and the new law of 1887.

**John Watts had authority to execute conveyance.**

The point raised by counsel that John Watts had no authority to execute the conveyance as attorney in fact, is fully answered in our main brief on pp. 155 to 176, in which we have shown, by reference to the testimony of John Watts himself, that he had such authority.

**Rule of Construction.**

The question involved is whether or not the deed was a present conveyance or an executory contract. This must be determined by a consideration of the deed itself, and not by what any of the parties to it may have said or done years afterwards. It is settled by abundant authority that where an agreement contemplates a further conveyance to vest title in the grantee, that then it is an executory contract. But the deed in question does not contemplate the execution of any further convey-

ance from the Watts heirs to Bouldin. It is an absolute conveyance of a present two-thirds interest. The deed conveys not only a two-thirds interest in Location No. 3; but a two-thirds interest in other lands, to-wit, Location No. 2, which had theretofore been located and approved by the Surveyor General, and Location No. 4, which had also been duly approved, and the title to which had passed out of the government.

We call particular attention to the habendum part of the deed, as set forth on page 276 of the Transcript of Record, the mere reading of which shows conclusively that a present title was conveyed, and no further conveyance was contemplated from the Watts heirs to Bouldin. For further consideration of this deed we refer to our main brief, pp. 186-190.

**Situation of the Parties.**

The situation of the parties is only considered when an instrument is ambiguous and requires construction. But there is no ambiguity in the deed from the Watts heirs to Bouldin. The language is plain and simple, and what is required is merely a careful consideration of its language; an inspection of the deed itself; for it clearly expresses what the parties desired to do, and what they did.

At the time of its execution Bouldin had deeds from other persons who claimed to be heirs of Luis Maria Baca, Tr. pp. 261-267. He claimed an interest not only in Location No. 3, but in other Baca locations, and it

was not only to engage his services, but also to compromise these conflicting claims, that the deed from the Watts heirs to him was executed. There is absolutely no evidence in this case in regard to the other tracts of land conveyed by the deed from the Watts heirs to Bouldin; and so far as we know, there may have been other differences and disputes in regard to those lands that the parties wished to settle and compromise. Nor does the evidence show what services Bouldin rendered in regard to those other tracts of land, nor how large were the expenditures he may have made in endeavoring to obtain the rights of the Watts heirs thereto.

**Executory consideration.**

Counsel assert that the only consideration for the deed were the services which Bouldin agreed to render. But this is not so. The deed itself recites that one of the considerations was "for the purpose of compromising and settling the claims of title between the parties of the first and second part." Counsel absolutely and utterly ignore this consideration, which was perhaps the most important and vital consideration that actuated the heirs of Watts to execute the deed. Whether it was or not, as shown in our main brief, the compromise of conflicting titles was an absolutely good consideration for the deed.

**No reward without effort.**

Counsel argue that there was nothing for Bouldin to do, and that he did nothing. This statement is not based upon any evidence in the record. Bouldin, as

before stated, was to perform services in regard to Location No. 2 and Location No. 4, as well as Location No. 3. He may, for aught this record shows, have performed most valuable services in regard to all these tracts of land, and made extensive expenditures of money. Counsel state in their brief, that in 1885 Bouldin entered into an agreement with Mr. Robinson to carry out the provisions of the order of the Commissioner of the General Land Office, dated March 12, 1885, authorizing Mr. Robinson to relocate the grant. There is no evidence in the record as to this fact, if it be a fact, and we regret that counsel has referred to matters not in the record. But if it were a fact, it shows that Mr. Bouldin did make efforts to do something in regard to Location No. 3.

Counsel further says, in his brief: "The record is clear and convincing that after conferences with Mr. Robinson in Washington, culminating in their written agreement executed there on June 8, 1885, Mr. Bouldin became convinced that it was to his interest to abandon and repudiate his contract of September 30, 1884, with John Watts, and work with Mr. Robinson," etc., p. 107 of brief of Mr. G. H. Brevillier.

There is absolutely no evidence in this case that Mr. Bouldin ever had a conference with Mr. Robinson in Washington, or anywhere else; there is no evidence that Mr. Bouldin abandoned or repudiated his contract of September 30, 1884, or that he agreed to work with Mr. Robinson.

Again, on page 109 of his brief, counsel says: "In his

partitions with Mr. Robinson, Mr. Bouldin clearly and emphatically stated that he was acting as attorney in fact for his son; and in his conveyance to his sons Mr. Bouldin conveyed the interest in the 1866 location which he had "purchased" for them with their money. (P. R. 90). This assertion of an adverse interest and association with a hostile party absolutely terminated the agency."

The reference (P. R. 90) is to page 90 of the Transcript of Record. We turn to that page to ascertain where any such evidence is in this case; for we assert there is no such evidence. On p. 90 of the Transcript we find a part of Par. XXI of Amended Answer of defendants Bouldin, which commences on p. 81 of Transcript, and in this amended answer is the allegation as follows:

> "They further say that whatever interest David W. Bouldin, Sr., took or had in the premises described in Par. II of the bill of complaint was taken and held in trust by the said David W. Bouldin, Sr., for his sons * * *"

By stipulation of the parties, made in open court, this allegation was deemed denied.

> "It was further stipulated in open court that all new matter set forth in each of the answers of the respective defendants and intervenors should be deemed and considered as denied by the plaintiffs, and each of the other defendants and intervenors,

without the necessity of filing further replies or replications thereof." Tr. p. 153.

In the face of this stipulation, denying the allegations above quoted in the answer of the Bouldins, counsel for Santa Cruz Development Company asserts as a fact, that David W.Bouldin purchased the interest from the Watts heirs, for his sons, and with their money, and asserted an adverse interest which terminated the agency. And his authority for this statement is the allegation in the answer of defendants Bouldin, which by stipulation in open court is deemed denied, not only by Joseph E. Wise, but by the Santa Cruz Development Company itself.

No evidence, no deed, no testimony, was introduced upon the trial by anyone, on the subject.

Again, counsel states in his brief, p. 109, that the transaction between Bouldin and Ireland and King was merely an employment of sub-contractors. There is absolutely no evidence of any employment of Ireland and King whatsoever. The evidence is simply a deed from Bouldin to King, of date February 21, 1885, Defendants Wise Exhibit 18, Tr. 312-314. This deed is an absolute conveyance of a 1-9 interest, or Bouldin's interest in the 1863 location; and at the end of the deed is an agreement "that all necessary expenses incurred in locating all or any part of the above described lands, or in perfecting title or obtaining other land or land certificates in lieu of said Location No. 3, shall be borne by the parties hereto in proportion to their several interests." Tr. 314.

We regret exceedingly to call attention to the misstatements of the record which counsel for Santa Cruz Development Company has seen fit to make in his brief; but we are compelled to do so for the reason that to permit such statements to go unchallenged, would lead the court to believe that the facts stated by counsel in his brief are supported by the record in this case, when as a matter of fact, they are not.

We note that counsel does not refer to the pages of the Transcript of Record in support of his statements of the facts which he sets forth in his brief, relative to the deed from the Watts heirs to Bouldin, as required by Rule 24, Par. I, sub div. (c), except the one reference to page 90, which we have above considered, and we can do no more than to call attention of the court to a few of his statements which we say are not supported by the evidence in the record.

The question under consideration is simply whether or not the deed from the Watts heirs to Bouldin was an executory contract or a conveyance of a present interest. This question must be determined, as before stated, by the words of the instrument itself. And we, therefore, will not further consider the various statements which counsel makes in his brief as to what David W. Bouldin did, or did not do, during the many years after the execution of that deed; such matters are utterly immaterial.

**The Santa Cruz Development Company cannot attack the deed from Watts' heirs to Bouldin.**

The Santa Cruz Development Company is in no po-

sition to attack the deed from the Watts heirs to Bouldin, even if construed to be an executory contract to convey.

Under that deed the Watts heirs were to have an undivided one-third interest in the lands therein described. That was the agreement the Watts heirs themselves made as binding upon themselves. In no event were they to have more than an one-third interest. We will quote from the deed itself:

> "And upon the final and complete settlement of the title to said lands, and all matters connected therewith, the parties of the first part (heirs of Watts) are to have, own and possess in fee an undivided one-third of the net lands recovered and one undivided one-third of the land certificates obtained, and an undivided one-third of all the moneys and other property recovered and secured by the party of the second part, net." Tr. 277-278.

This deed, or agreement, or whatever it may be called, was in force in 1884 when it was made, and never has been abrogated; it never has been set aside. The Watts heirs have never repudiated it.

All the Watts heirs have done is to convey, by deed made nearly thirty years after the agreement with Bouldin was executed, their interest to James W. Vroom. The deed from John Watts to Vroom is dated February 3, 1913. Tr. p. 412.

If the Watts heirs were bound by their agreement to have no more than a one-third interest, upon the final

settlement of the title, James W. Vroom has acquired by his deed, no greater right than his grantors had.

Vroom, by deed dated June 11, 1913, conveyed his interest to the Santa Cruz Development Company, Tr. p. 412, of which he is president, Tr. p. 312. That company has acquired no greater interest than Vroom had; and neither Vroom nor the Santa Cruz Development Company has acquired a right to any other or greater interest than the Watts heirs had.

They are bound by the agreement of the Watts heirs, as set forth in the deed from the Watts heirs to Bouldin, to-wit: "to have, own and possess in fee an undivided one-third of the net lands recovered, etc.," and no more.

If this deed were construed to be an executory contract, and if this were a suit brought by the heirs of Watts themselves, to have it set aside for any reason whatsoever; even then, the titles having been settled before the suit was brought, the Watts heirs, or their grantees, having now a good title to their one-third interest, being all the title they were to own or possess under the contract, a court of equity would refuse to set it aside, but on the contrary would enforce it.

It is too late for the Watts heirs, or anyone claiming under them, after they have received the full measure of all they are entitled to under the contract, to hold on to that, and seek to recover the consideration paid to the other party.

The Watts heirs have never attempted any such repu-

diation. The Santa Cruz Development Company, who was not a party to the contract at all; who acquired its deed with full notice, both actual and constructive, for the deed from Watts' heirs to Bouldin has been duly recorded since 1888, do seek to set this contract aside; and seek in this action to acquire the 2-3 interest which the Watts heirs themselves were not entitled to, and never claimed.

We therefore submit that the deed from the Watts heirs to Bouldin was a conveyance of an undivided 2-3 interest, and was not an executory contract to convey, so far as this 2-3 interest was concerned. That this deed further contained a positive agreement on the part of the Watts heirs, that all they were to have, or ever should be entitled to, was an undivided 1-3 interest in whatever lands or titles finally recovered or obtained; that this agreement has never been abrogated, annulled or set aside, and that all the Watts heirs, or the Santa Cruz Development Company, its grantee, is entitled to, is an undivided 1-3 interest in the title as finally adjudicated by the Supreme Court of the United States in the case of Lane vs. Watts, 234 U. S. 525-542; and this undivided 1-3 interest of the ancestor John S. Watts we have conceded to them all the way through this case; and in the main brief we heretofore filed herein, to which we respectfully refer, shows with accuracy what that interest is. (Our main brief, pp. 236-237.)

We respectfully submit, for the reasons herein stated, and as more fully stated in our main brief, that this deed

is a valid conveyance, and that Joseph E. Wise and the Intervenors, are now the owners of said 2-3 interest, in the proportions as set forth in our main brief, at pages 250-252 thereof.

Respectfully submited,

SELIM M. FRANKLIN,

Attorney for Joseph E. Wise and Lucia J. Wise, Appellants.

No. 2719

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

SANTA CRUZ DEVELOPMENT COMPANY,
*Appellant,*

Against

CORNELIUS C. WATTS et al.,
*Appellees.*

## REPLY BRIEF IN BEHALF OF SANTA CRUZ DEVELOPMENT COMPANY, APPELLANT.

G. H. BREVILLIER,
*Counsel for Santa Cruz Development Company.*



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The only function of the survey was to segregate the land from the Public Domain, as legal title passed from the United States to the heirs of Baca on April 9, 1864, to the 1863 tract, which had been selected and approved by the same metes and bounds and beginning point as used at bar (*Lane v. Watts,* 234 U. S. 525; 235 U. S. 17).

The Act of 1860 which created the grant gave a power of selection, and also the right to a survey when required by the heirs. Under the Act of Congress of June 2, 1862 (12 Stat. 410), referred to in the opinions in *Lane v. Watts,* it was provided:

> *"But nothing in the law requiring the executive officers to survey land claimed or granted under any laws of the United States shall be construed either to authorize such officers to pass upon the validity of the titles granted by or under such laws, or to give any greater effect to the surveys made by them than to make such surveys prima facie evidence of the true location of the land claimed or granted, nor shall any such grant be deemed incomplete for want of a survey or patent when the land granted may be ascertained without a survey or patent."*

Furthermore, it is well settled that

> *"the survey is one thing and the title another. * * * A survey does not create a title; it only defines boundaries. Conceding the accuracy of a survey is not an admission of title"* (*Russell v. Maxwell Land Grant Co.,* 158 U. S. 253, 259).

A grant delivered out for survey, as the 1863 tract was on April 9, 1864, means a perfect title.

*United States v. Hanson,* 16 Pet. 196, 200
*United States v. Boisdore,* 11 How. 63, 92

In the case at bar there was a definite description of a specific tract, easily capable of identification, and, therefore, segregation by survey was not necessary to pass title.

*Langdeau v. Hanes,* 21 Wall., 521, 530, 531 (Approved in *Shaw v. Kellogg,* 170 U. S. 312, 341, and in *Joplin v. Chachere,* 192 U. S. 94)
*Snyder v. Sickels,* 98 U. S. 203, 213, 214
*Morrow v. Whitney,* 95 U. S. 551
*Whitney v. Morrow,* 112 U. S. 693, 695
*Glasgow v. Hortiz,* 1 Black 595, 601, 602
*Act of June 2, 1862* (12 Stat. 410)

The function of the survey was not to pass title, but to mark out the land so that its boundaries might be officially monumented, to designate it on a plat of survey according to the township and section system (the approved method of describing Western lands) and to inform the Government what land it had left. The United States fixes the boundaries between its remaining land and the land of its grantee.

*Russell v. Maxwell Land Grant Co.,* 158 U. S. 253
*Langdeau v. Hanes,* 21 Wall. 521, 530
*Joplin v. Chachere,* 192 U. S. 94
*U. S. v. Montana Land Co.,* 196 U. S. 573, 578

The orderly procedure in taking possession of public lands granted by the United States, where the grant is not in confirmance of a previous possession, is to wait until the Surveyor General marks out on the ground the lines of the grant, even though anyone could readily ascertain them without official aid

The delay of the ministerial officers of the Government in performing the ministerial act of the survey neither divested the title nor suspended its vesting.

> *Stalker v. Oregon Short Line,* 225 U. S. 142, 153
> *Glasgow v. Hortiz,* 1 Black 595, 601, 602
> *Lytle v. Arkansas,* 9 How. 314, 333

In *Lane v. Watts*, Judge Barnard, who wrote the opinion on final hearing in the Supreme Court of the District of Columbia, said:

> "The purpose of such survey is to separate or segregate the land, the title to which passes to the grantees, from the Public Domain, so as to enable the grantees to take possession and maintain their property lines, and the officers of the Land Department to know what are public lands."

The United States Supreme Court in *Lane v. Watts,* 235 U. S. 17, said of its opinion in 234 U. S. 525

> "The opinion is explicit as to the main elements of decision. It decides that the title to the lands involved passed to the heirs of Baca by the location of the Float and its approval by

> the officers of the Land Department and order for survey in 1864 in pursuance of the Act of 1860; (12 Stat. 71, 72). A survey, it was said, was necessary to segregate the land from the Public Domain and the condition was satisfied by the Contzen survey."

In the case of *Stoneroad v. Stoneroad,* 158 U. S. 240, cited by the United States Supreme Court in *Lane v. Watts,* the Court held that a survey was necessary for the definite segregation and delimitation of the land, and said:

> If there was no legal official survey "we are without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant."

The *Stoneroad* case was an ejectment action, brought against an individual who claimed land outside of the official survey of the grant but inside what was claimed to be the correct lines of the grant. The Court held that the Government survey was the only evidence to determine whether or not there was a conflict.

As a sovereign, the United States retains the right of survey to mark on the ground the boundaries of its grants. The Baca heirs received legal title to the 1863 tract on April 9, 1864, and their title to the specific land was then complete; but they had not the right to survey and mark on the ground the description used in the notice of selection, as that

> "Would reverse the statutory order of powers" and "would impair the Government's right of

> survey and force it into controversies over surveys made by its grantees."
>
> *United States v. The Montana Lumber Co.,* 196 U. S. 573, 578

The Contzen survey, therefore, definitely segregated from the Public Domain the land within the specified selection made on June 17, 1863, to which title passed from the United States on April 9, 1864, and segregated the land only to the extent that it furnished "recognition of boundaries" (*Glasgow v. Hortiz,* 1 Black 595, 601, 602) and physically monumented and marked it.

In the *Prentice* cases, a metes and bounds description had been used in the deed, *although at the time the deed was executed no survey had been made nor any lands officially allowed to the grant.* Nevertheless the Court said (154 U. S. 163):

> "The selection had definiteness about it to a certain extent; it was a thing which could be conveyed specifically; and which Armstrong undertook to convey specifically."

The deed was held to the specific description, notwithstanding that the selection had not been "tied down" to any specific description, nor the right to any particular land officially allowed at the time of the deed.

Notwithstanding that the metes and bounds of the 1863 tract had not been officially monumented on the ground at the time of the Hawley deed, this cannot be considered in any way in construing that instrument. Nothing that the surveyor might do

or might not do could change the fact that legal title had passed from the United States to the Baca heirs on April 9, 1864 to the specific land of the 1863 tract, under a selection with the same description as in the deed from the Baca heirs to John S. Watts of May 1, 1864.

**Effect of conditional allowance of amended location**

Under the Commissioner's order of May 21, 1866 (P. R. 177), it was incumbent upon the Surveyor General to examine the 1866 tract to ascertain whether it was vacant land not mineral.

Had the Surveyor General found that it was not proper land, then the conditional allowance of May 21, 1866 would have been expressly inoperative. If the Surveyor General had found that the 1866 tract was in fact "vacant land not mineral," and if the Secretary of the Interior had not, before the approval of such a survey, overruled the Commissioner's action of May 21, 1866, title to the 1866 tract would have passed absolutely from the United States.

The Commissioner's power to act in the disposal of public lands, in administration of the Public Land laws, is plenary and final, unless and until overruled by the Secretary of the Interior prior to the passing of legal title.

*Beley v. Naphtaly,* 169 U. S. 353, 365
*Ballinger v. Frost,* 216 U. S. 240

*United States v. Schurz,* 102 U. S. 378, 396, 402, 404
*Moore v. Robbins,* 96 U. S. 530, 533
*Bishop of Nesqually v. Gibbons,* 158 U. S. 155, 166, 167
*United States v. Barnes,* 222 U. S. 513, 521
*Cosmos Co. v. Gray Eagle Co.* 190 U. S. 301, 309

**Number of Baca Locations No. 3**

In the Watts and Davis brief, the statement is repeatedly made that there was and could be only one Baca Float No. 3.

As a matter of fact, there have been three tracts to which that name did and could apply:

1. The Bosque Redondo selection of 1862 which was withdrawn before approval.
2. The 1863 tract which was absolutely confirmed on April 9, 1864.
3. The 1866 tract which was first conditionally confirmed in 1866 and finally disallowed.

While the Baca heirs could ultimately keep only one tract as Location No. 3, still they could and did deal simultaneously with two tracts by that name, and could and did have varied titles thereto, each of which might be the subject of quitclaim or conveyance.

It is with the actual supposed situation in 1870 that this Court must deal, and not with the con-

structive legal situation created by the Secretary's decision of July 25, 1899 (29 L. D. 44). Men convey what they think they own; not what they unknowingly own (*Russell v. Trustees,* 1 Wheat. 432, 436, 437).

**Ascertaining intention**

Of course the aim of all interpretation is to find the intention of the parties. In a deed that can be determined only from the deed itself (main brief pages 32, 33, 37, 38). As the result of centuries of experience, the courts have formulated definite rules to ascertain this intent.

If all the calls of description point to one tract, that tract alone passes, although it may appear that the grantor intended other premises to pass also, which were included within only a part of the description.

*4 A & E Ency.* (2nd Ed.) Secs. 799, 800
*Washburn on Real Property* (6th Ed.) Sec. 2319
*Tiedeman on Real Property* (2nd Ed.) Sec. 829

In case there is a conflict between general calls and a complete description by metes and bounds, then the metes and bounds control (main brief, pages 38 to 46).

No cases can be found in variance with these rules. Appellees' cases, so far as we have had time to examine them, present nothing to the contrary,

and the general language of the opinions, when applied to the facts, show that the cases are not at variance with the rules we have given.

Counsel for appellees Watts and Davis cite many cases to the effect that the intention is to be gathered from the whole instrument. This is true only to the extent that each and every part of the instrument must be considered and retained if possible, and that the intention must be gathered from the instrument itself and not from any "conjectural" intent based on a surmise that the metes and bounds were not deemed of importance by the parties to the Hawley deed. This is discussed on pages 37, 38 and 66 of our main brief.

**Function of metes and bounds**

The metes and bounds of the Hawley deed were inserted to furnish the clearest and most specific evidence of the grantor's intent.

The title references were inserted simply to show the grantor's source of title (main brief, page 64). They refer to the specific description, in accordance with the customary method of conveyancing, and furnish a guide to future examiners of the title.

Certainly an intention to convey the 1863 tract is not shown by the insertion in the Hawley deed of the metes and bounds of the 1866 tract.

If Judge Watts had intended to convey Baca Float No. 3 wheresoever or ultimately situate,

> "It is remarkable that he did not do so in the very few words necessary to express that idea."
>
> *(Prentice v. N. P. R. R. Co.,* 154 U. S. 163, 175, 176.)

**Santa Rita Mountains**

On page 35 of the Watts and Davis brief, the statement is made:

> "A large part of the 1863 location was composed of the spurs and ridges of the Santa Rita Mts., and it was generally considered the foothills of the Santa Ritas."

This is directly contrary to Mr. Contzen's uncontradicted testimony (P. R. pages 381 to 383), his map (P. R. p. 379) and the map which he made (S. C. D. Co. Exhibit 13 sent up with the record) showing the location of the two tracts with reference to the Santa Rita Mts. The "spurs and ridges" to which he refers are "along the side lines of those (Mexican) grants." The only real spur of the Santa Ritas within the 1863 tract is the San Cayetano Range (P. R. 382) shown on the map (P. R. 379). Only in a "few miles" of the overlap near Salero Hill is there any part of the Santa Rita Mts. or the foothills thereof.

In S. C. D. Co. Exhibit 13, made by Mr. Contzen in 1905 for the Land Department, for the purpose

of "showing the Santa Rita Mts. with reference to the Baca Float" (Report of Surveyor General Ingalls, page 277 of Record in *Lane v. Watts*), the Santa Rita Mts. extend only into the northern and eastern part of the overlap, while the San Cayetano Mts. and Grosvenor Hills are the only hills or mountains within so much of the 1863 tract as is not within the overlap.

**Plaintiffs' application of general calls and references**

On page 35 of the Watts and Davis brief, the statement is made that the expression in the Hawley deed, "granted to the heirs of Luis Maria Cabeza de Baca by the United States", applies to the 1863 location. That is correct; but the expression equally applies to the 1866 tract (main brief, page 65). Until 1899, that conditional grant was supposed to be valid.

The statement is then made that the words "by said heirs conveyed to the party of the first part by deed dated on the first day of May, 1864" correctly describe the 1863 location. If that be true, it is also true as to the 1866 tract (main brief, pages 65 and 66). It certainly by itself can apply to locations two and four, which together with the 1863 tract were described in the deeds of May 1, 1864.

The statement is then made that the clause following the specific description in the Hawley deed "the said tract of land being *known as* Location No. 3

of the Baca series" describes the 1863 location. That is untrue by the plaintiffs' own pleading (P. R. 7) and the uncontradicted evidence in this case (P. R. 247, 248, 251).

**Statutes of Limitation as to Adverse Possession**

In Mr. Franklin's brief, he admits that the general rule is that title by adverse possession against a grantee from the United States can be initiated only after the approval of the official survey. Nevertheless, he argues that in *Lane v. Watts,* the United States Supreme Court intended to take this case from the general rule.

In *Lane v. Watts,* the United States Supreme Court in both opinions, referred with approval to the *Stoneroad* case (158 U. S. 240). In that case the Court expressly held that until there was an official survey, the grant owner could not maintain ejectment against an adverse occupant, as the courts would be

> "without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant."

The entire subject of survey is discussed on pages 1 to 7 herein.

Respectfully submitted,

G. H. Brevillier,

*Counsel for Santa Cruz Development Company.*